

1721767 (Refugee) [2020] AATA 4978 (26 October 2020)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1721767

COUNTRY OF REFERENCE: China

MEMBER: Damian Creedon

DATE: 26 October 2020

PLACE OF DECISION: Perth

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(b) of the Migration Act.

- 1.
2. Statement made on 26 October 2020 at 2:24pm
- 3.

CATCHWORDS

REFUGEE – protection visa – China – member of the same family unit – applicant’s wife granted a protection visa – genuine and continuing relationship – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5(1), 5F, 5H, 5J – 5LA, 36, 65
Migration Regulations 1994, Schedule 2; r 1.12

4. Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 of the Migration Act 1958 and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependants.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection on 29 August 2017 to refuse to grant the applicant a protection visa under s.65 of the *Migration Act 1958* (the Act).
6. The applicant who claims to be a citizen of China, applied for the visa on 30 June 2015. The delegate refused to grant the visa on the basis that the applicant is not a refugee as defined by s5H(1) of the Act and there were not substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed to his receiving country, there was a real risk he would suffer significant harm.

CRITERIA FOR A PROTECTION VISA

7. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, he or she is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.
8. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee.
9. A person is a refugee if, in the case of a person who has a nationality, they are outside the country of their nationality and, owing to a well-founded fear of persecution, are unable or unwilling to avail themselves of the protection of that country: s.5H(1)(a). In the case of a person without a nationality, they are a refugee if they are outside the country of their former habitual residence and, owing to a well-founded fear of persecution, are unable or unwilling to return to that country: s.5H(1)(b).
10. Under s.5J(1), a person has a well-founded fear of persecution if they fear being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, there is a real chance they would be persecuted for one or more of those reasons, and the real chance of persecution relates to all areas of the relevant country. Additional requirements relating to a 'well-founded fear of persecution' and circumstances in which a person will be taken not to have such a fear are set out in ss.5J(2)-(6) and ss.5K-LA, which are extracted in the attachment to this decision.
11. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of the visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion'). The meaning of significant harm, and the circumstances in which a person will be taken not to face a real risk of significant harm, are set out in ss.36(2A) and (2B), which are extracted in the attachment to this decision.

Mandatory considerations

12. In accordance with Ministerial Direction No.84, made under s.499 of the Act, the Tribunal has taken account of the 'Refugee Law Guidelines' and 'Complementary Protection Guidelines' prepared by the Department of Home Affairs, and country information assessments prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. While the issue before the delegate was whether the applicant met the refugee criteria, or was owed complementary protection, the issue before the Tribunal became whether, at the time of decision, the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.
14. In reaching its decision the Tribunal did not consider a hearing to be necessary, as it was able to find in favour of the visa applicant on the basis of the material before it, pursuant to s.360(2)(a) of the Act
15. Reg 1.12 of the Act defines *member of the family unit* as including a *spouse* or *de facto partner*. The applicant claims to be married to [Ms A].
16. There is evidence before the Tribunal, including Departmental records, indicating that [Ms A] was granted a protection visa on 16 December 2019 upon being found to be of refugee, pursuant to s.36(2)(a). She remains to hold that visa. Section 5F defines a *spouse* as being a person who is lawfully married to the other, they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, their relationship is genuine and continuing, and they lived together or they do not live separately and apart on a permanent basis.
17. The applicant provided the Tribunal with copies of the following documents:
 - a. A '*Certificate of Marriage*' issued by [a specified] Marriage Celebrant confirming the marriage of the applicant and [Ms A] [in] November 2016.
 - b. A '*Marriage Certificate*'¹ issued by the Western Australian Registrar of Births, Deaths and Marriages certifying that the applicant and [Ms A] were married [in] November 2016.
 - c. A '*Certificate of Title*'² issued under the *Transfer of Land Act 1893* (WA) recording the applicant and [Ms A] as joint tenants of the residential property particularised therein. The Certificate of Title records that transfer of the property to the applicant and [Ms A] was registered [in] April 2019.
 - d. [Bank 1] account statements, including cross-authorisation to operate accounts, between the applicant and [Ms A].
 - e. A utility account in the name of the applicant and [Ms A].

¹Registration Number [number]; Certificate [Number].

²[Details deleted.].

- f. A private health insurance policy 'Membership Certificate' issued [in] January 2020 recording the applicant as 'Contributor' and (on a 'Clearance Certificate') [Ms A] as 'Partner' to the same policy.
 - g. Six letters of support from members of the applicant's and [Ms A's] church attesting to the couple's mutual commitment to each other, their marriage and their married life together.
 - h. A signed written statement from [Ms A] dated 1 October 2020 attesting to her marriage to the applicant and their mutual commitment to each other.
18. In consideration of the evidence as a whole, the Tribunal is satisfied that the applicant is [Ms A's] spouse as defined in s.5F of the Act and that he is therefore a member of her family unit as defined in Reg 1.12 of the Act.
19. The evidence before the Tribunal indicates that the applicant applied for a protection visa, (Class XA) and [Ms A] was granted a protection visa of the same Class. Accordingly, and as required by subs.36(2)(b)(ii), [Ms A] holds a protection visa of the same Class as that applied for by the applicant.
20. The next question relates to Section 91WB which provides that:
- 21. *Application for protection visa by member of same family unit*
 - (1) *This section applies to a non-citizen in Australia (the **family applicant**):*
 - (a) *who applies for a protection visa; and*
 - (b) *who is a member of the same family unit as a person (the **family visa holder**) who has been granted a protection visa.*
 - (2) *Despite anything else in this Act, the Minister must not grant the protection visa to the family applicant on the basis of a criterion mentioned in paragraph 36(2)(b) or (c) unless the family applicant applies for the protection visa before the family visa holder is granted a protection visa.*
22. The applicant applied for the protection visa on 30 June 2015. [Ms A] was granted the protection visa on 16 December 2019. Therefore, the Tribunal finds that s.91WB does not apply to the applicant and the applicant is consequently not prohibited from being granted a protection visa on that basis.
23. In light of that finding, the Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(b) of the Migration Act.

DECISION

24. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(b) of the Migration Act

Damian Creedon
Member

ATTACHMENT - Extract from *Migration Act 1958*

5 (1) Interpretation

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

5H Meaning of refugee

- (1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a ***refugee*** if the person is:
 - (a) in a case where the person has a nationality – is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
 - (b) in a case where the person does not have a nationality – is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a ***well-founded fear of persecution*** if:

- (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.
- Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a ***well-founded fear of persecution*** if effective protection measures are available to the person in a receiving country.
- Note: For effective protection measures, see section 5LA.
- (3) A person does not have a ***well-founded fear of persecution*** if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
 - (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
 - (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of ***serious harm*** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
 - (6) In determining whether the person has a ***well-founded fear of persecution*** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the ***first person***), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or
 - (ii) any other member or former member (whether alive or dead) of the family has ever experienced;
 where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.
- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
 - (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or

- (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...